No. 96-420

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. The Eleventh Circuit's Creation of an Exception to the Clean Water Act's "Zero Discharge Standard" is Contrary to Prior Decisions of this Court and to Longstanding Statutory Interpretations of the United States Environmental Protection Agency.

In its Response to Terence D. Hughey's Petition for Writ *Certiorari*, JMS Development Corporation ("JMS") effectively acknowledges that the Federal Clean Water Act, 33 U.S.C. §

1251, et seq., ("CWA") contains an absolute prohibition on the discharge of pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit. JMS also effectively admits that the Eleventh Circuit departed from the express language of the CWA to carve out an exception for JMS' unpermitted discharges of polluted stormwater. Given that the absoluteness of the CWA's "zero discharge standard" has been recognized in previous decisions by this Court[1] and the Circuit Courts of Appeals,[2] the Eleventh Circuit's novel opinion in

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[1] See EPA v. California, *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976); see also E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 118, 97 S. Ct. 965, 970 (1977); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 72, 101 S. Ct. 295, 301 (1980) ; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11, 101 S. Ct. 2615, 2622 (1981) ("National Sea Clammers"); City of Milwaukee v. Illinois and Michigan, 451 U.S. 304,101 S. Ct. 1784 (1981); Weinberger v. Romero-Barcelo, 456 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455 (1985); Chemical Manufacturer's Assoc. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 105 S. Ct. 1102 (1985); International Paper Co. v. Ouellette, 479 U.S. 481, 489, 107 S. Ct. 805, 810 (1987) ("Ouellette"); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 53, 108 S. Ct. 376, 379 (1987) ("Gwaltney"); U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112. S. Ct. 1627 (1992); City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638 (1992); Arkansas v. Oklahoma, 503 U.S. 91, 112 S. Ct. 1046 (1992); PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994).

[2] Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3241, 65 U.S.LW. 3256 (1996) (No. 95-1831); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), *reh'g denied*, 468 U.S. 1227 (1984); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977); Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-38 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980); and Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983).

Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. April 1, 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996) ("JMS"), raises an issue of national importance worthy of review by this Court. Review is also appropriate in order to resolve the clear split of authority on this issue between the Eleventh Circuit's decision in JMS and the Fifth Circuit's decision in Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831). Accordingly, Petitioner respectfully requests that this Court grant his Petition for Writ of *Certiorari*.

JMS argues that the exception created by the Eleventh Circuit is justified if limited to the narrow facts of this case. In particular, JMS argues that the developer of a residential subdivision should not be subject to the zero discharge standard when a NPDES permit is not available from the issuing agency and compliance with the standard is alleged to be impossible.

Nothing in the CWA supports Respondent's argument or the Eleventh Circuit's opinion. The CWA by its express terms prohibits the discharge of *any* pollutants without an NPDES permit. The Eleventh Circuit does not have the authority - on this or any other set of facts - to create an exception to the permit requirement in cases where an issuing agency fails to make a permit available. If a prospective permittee cannot obtain an NPDES permit for its project before beginning to discharge, that project cannot go forward. Nothing in the CWA authorizes persons who fail to obtain (or fail to apply for) an NPDES permit to go ahead with the discharge of pollutants, claiming as a defense that compliance with the zero discharge

standard is impossible. Rather, the CWA absolutely prohibits the unpermitted discharge of pollutants to the Nation's waters. 33 U.S.C. § 1311.

JMS ignores the fact that it could have complied with the CWA by delaying land disturbing activities until it obtained an NPDES permit from the Georgia Environmental Protection Division ("EPD"). Once JMS chose to break ground without a permit, it took the risk that compliance with the zero discharge standard would be difficult. Even limited to the facts of this case, the Eleventh Circuit's decision is in error because it sets aside JMS' clear obligation under the statute to obtain an NPDES permit *before* engaging in activities that could result in the release of contaminants to waters of the United States. If a permit was not available, JMS ran the risk of a citizens suit if it proceeded with construction of the development.

This reading of the statute is fully consistent with longstanding interpretations of the CWA put forth by the United States Environmental Protection Agency ("EPA"), the agency responsible for developing and implementing the stormwater permitting program at the national level. The EPA has consistently adhered to a literal interpretation of the "zero discharge standard" adopted by Congress. Throughout the stormwater permitting process, the EPA has maintained that industrial entities wishing to discharge stormwater are required by the CWA to have an NPDES permit, even if such permits are not available due to administrative delays in meeting

statutory deadlines.[3] See, e.g., 50 Fed. Reg. 32548 (1985). EPA has noted that industrial dischargers unable to obtain NPDES permits for stormwater are subject to citizen suits under the CWA. See, e.g., 50 Fed. Reg. 35200, 35201-35202 (1985) (industrial dischargers of storm water remain subject to citizen suits pending promulgation of permits by EPA and authorized states). Until a permit is actually issued, "citizens remain free to initiate private enforcement actions, and to bring to the attention of permit-writing authorities any specific situation that warrants review." Id. at 35201. The EPA's construction of the Act must be accorded considerable weight and its administrative interpretations deferred to by the courts unless manifestly contrary to the intent of Congress. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

When it issued a General Permit for discharges of stormwater from construction sites, EPA unequivocally stated that "if a facility is located in an NPDES state that does not offer a general permit, then that facility must apply for an individual permit.") (R2-19-19) (emphasis supplied) (see Reply Appendix, p. RA-5). In light of this guidance from EPA, it is clear that once JMS received Mr. Hughey's sixty (60) day

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[3] Storm water discharges have been subject to NPDES permit requirements since 1976. 50 Fed. Reg. at 32548. In a series of rule-makings published during the 1980's, the EPA established procedures and deadlines for industrial dischargers to apply for storm water permits. Congress subsequently extended the deadline for industrial dischargers to obtain a storm water permit until February 4, 1991. 33 U.S.C. § 1342 (p)(4)(A). Neither the EPA nor the Georgia EPD promulgated permits before this deadline expired. The deadline expired over a year and a half before JMS began construction of its development.

notice of intent to sue under the CWA, it should have approached the EPD for a general permit, and, upon learning that a general permit was required but not yet available, submitted an application for an individual permit covering its project.[4] JMS did not do this. In fact, it did not even attempt to qualify for a general permit until after the district court entered a temporary restraining order. Upon learning that a general permit was not available, JMS continued its unpermitted discharge of contaminants from the construction site, in amounts as high as 2,000 times the effluent limitations established in State and local law. (R3-26-3; P. Exh. 28-31 (sample results)). Contrary to the contentions of Respondent, JMS was not in substantial compliance with its development permit, and its discharges were not de minimis.

The irony of the Eleventh Circuit opinion is that it absolves from liability conduct that clearly would have been unlawful under the general NPDES permit ultimately issued by Georgia EPD. (See Respondent's Appendix, pp. 22, 57). The decision rewards JMS for setting in motion - prior to even seeking a permit - a series of discharges it later claimed to be powerless to stop. The decision likewise rewards Georgia EPD for shirking its duty to issue a permit in "a specific situation that warrants review," 50 Fed. Reg. at 35201, a situation brought to EPD's attention by Mr. Hughey before he filed suit. In so doing, the decision significantly undercuts the effectiveness of the CWA's citizen suit provision. This

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[4] If EPD followed through on its threat not to process such applications (See Respondent's Appendix, p. 16), JMS could have brought an action against EPD to compel issuance of a permit for which it was qualified. DNR Rule 391-3-6-.15; Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 248 Ga. 826, 286 S.E. 707, 709 (1982).

provision is specifically designed to allow citizens like Mr. Hughey to compel compliance with the CWA when dischargers and government agencies fail to act to prevent contamination of the Nation's waters.

None of the cases cited by Respondent recognize exceptions to the CWA's absolute prohibition against discharging pollutants without a NPDES permit. Respondent is correct that certain provisions of the CWA envision the exercise of discretion. However, the statute's prohibition against the unpermitted discharges of pollutants is absolute, and the cases cited by Respondent do not hold to the contrary. Moreover, the cases principally relied upon by Respondent are inapposite because they involve discharges of pollutants by entities holding a validly issued NPDES permit: Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company, 12 F.3d 353 (2d Cir. 1993), cert. denied, __ U.S. __, 115 S.Ct. 62 (1994); Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995). Atlantic States relies on the so-called "permit shield" provision of the CWA to hold that the zero discharge standard does not apply when a facility discharges pollutants not listed in its permit, so long as the permittee is otherwise in compliance with the permit's effluent limitations. 12 F.3d at 357; see 33 U.S.C. § 1342(k). In contrast, the zero discharge standard does apply to JMS' discharges because JMS did not have an NPDES permit.

Contrary to the assertions of Respondent, this case is analogous to, and in direct conflict with, the Cedar Point Oil case decided by the Fifth Circuit. 73 F.3d at 546. In both cases the defendants undertook affirmative actions that resulted in unpermitted discharges of pollutants. (In the case at bar, it was

the affirmative act of JMS in breaking ground without a permit that resulted in violations of the zero discharge standard.) In both cases the issuing agency failed to make available a NPDES permit. Faced with these facts, the Fifth Circuit carefully reviewed the statute and the legislative history and chose to uphold the absolute prohibition against unpermitted discharges. In contrast, the Eleventh Circuit engaged in judicial activism and created an exception to the standard that runs counter to the express wording of the CWA and longstanding EPA statutory interpretations. Because the Eleventh Circuit's decision in this case directly conflicts with prior decisions of this Court and the Fifth Circuit's opinion in Cedar Point Oil, Petitioner urges this Court to grant his Petition for Writ of *Certiorari* to review the Eleventh Circuit's erroneous interpretation of the CWA, and reverse its judgment.

II. The Eleventh Circuit's Alternative Holding Should Also be Reviewed by This Court.

An injunction does not violate the specificity requirement in Rule 65 unless it is clear that the defendant could not understand its obligations under the injunction. Combs v. Ryan's Coal Co., Inc., 785 F.2d 970, 978 (11th Cir. 1986). JMS could clearly understand that it must not discharge polluted stormwater unless it obtained a permit which authorized such discharges. In any case, an injunction failing to meet Rule 65(d)'s specificity requirement should not necessarily be voided. Keyes v. School District No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990) (striking only the portions of the decree that were too vague under Rule 65) and U.S. v. Holtzman, 762 F.2d 720, 766 (9th Cir. 1985) (court should not set aside an injunction unless it has no reasonably specific

meaning). This Court should review the Eleventh Circuit's alternative reason for reversing the district court, and remand the case to the Eleventh Circuit for proceedings not inconsistent with this Court's rulings.

CONCLUSION

This case presents the Court with an issue of national importance and an opportunity to resolve a clear conflict among the Circuits. Petitioner therefore urges this Court to grant the Petition for Writ of *Certiorari*. Additionally, because this case involves an issue of statutory interpretation on which the EPA has expressed clear views for over a decade, Petitioner respectfully requests that this Court seek the views of the Solicitor General.

Respectfully submitted,

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APPENDIX

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REPLY BRIEF APPENDIX

[50 Federal Register, 35200-01 (Aug. 29, 1985)]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT REGULATIONS; MODIFICATION OF APPLICATION DEADLINE FOR STORE WATER POINT SOURCES

Environmental Protection Agency
Final Rule

[text omitted]

IV. Summary of Comments

[The] commenters are also correct in their statement that storm water point source dischargers have required NPDES permits for some years. Although some dischargers have already applied for and received permits for storm water discharges, the vast majority of such dischargers have not applied for permits. However, there has been some uncertainty in recent years concerning permit application requirements, particularly in those States in which EPA administers the NPDES program... Postponement of the [application] deadline clearly would not preclude requiring a permit application or issuance of a permit in the interim on a case-by-case basis as appropriate if a problem is identified. Finally, citizens remain free to initiate private enforcement actions, and to bring to the attention of permit writing authorities any specific situation that warrants review.

[text omitted]

It should be re-emphasized that these deadline extensions do not relieve point source dischargers from the requirement to

obtain NPDES permits. EPA regional offices have been directed to respond to inquiries and petitions concerning specific storm water discharges which may pose problems. The extension does not preclude issuance of permits where a problem is identified, nor does it affect citizens rights under section 505 of the Act. States authorized to administer the NPDES program remain free to require permit applications at earlier dates.

[50 Federal Register, 32548-01 (Aug. 12, 1985)]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT REGULATIONS; STORM WATER POINT SOURCES

Environmental Protection Agency
Proposed Rule; Reopening of Comment Period

[text omitted]

I. Background

[text omitted]

The application deadline does not eliminate the requirement for a point source to have a permit, nor does it provide protection from enforcement actions by citizen groups or NPDES states.

[S]torm water discharges have been subject to NPDES permit requirements since 1976...

[U.S. EPA Letterhead]

Environmental News

EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT

Thursday, September 3, 1992
Sean McElheny 202-260-1387

As of today, industrial facilities have two application options. They must apply for either a general or individual permit by Oct. 1, 1992. If a facility is located in a NPDES state that does not offer a general permit, then that facility must apply for an individual permit. EPA urges facilities to apply for a general permit to avoid the more expensive and complex individual permit. Applications for coverage under today's permits should be sent to EPA's NOI Processing Center; Storm Water Notice of Intent, P.O. Box 1215, Newington, Va. 22122.